

Commenter: Cox  
Applicant: SBC  
State: OK

DOCKET FILE COPY ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

ORIGINAL

In the Matter of )  
)  
Application of SBC Communications, Inc. )  
Pursuant to Section 271 of the )  
Telecommunications Act of 1996 )  
To Provide In-Region, InterLATA Services )  
in Kansas and Oklahoma )

CC Docket No. 00-217

RECEIVED

NOV 15 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COMMENTS OF COX COMMUNICATIONS, INC.

Carrington F. Phillip  
Vice President, Regulatory Affairs

Donald L. Crosby  
Senior Counsel

1400 Lake Hearn Drive, NE  
Atlanta, GA 30319

November 15, 2000

No. of Copies rec'd  
List A B C D E

071

## SUMMARY

Cox opposes the application filed by SBC Communications, Inc., seeking FCC authority to furnish in-region, interLATA services in Kansas and Oklahoma. This is the second time following the enactment of the Telecommunications Act of 1996 that SBC has sought such authority in Oklahoma, and SBC still falls substantially short of “fully implementing” the Competitive Checklist. As the only true facilities-based local telephone service provider operating in Oklahoma, Cox is aware that only an insignificant level of local competition has developed in Oklahoma. The FCC found in 1997 that competition in Oklahoma’s local market was lacking, and it continues to be lacking in any significant amount today.

The proceeding conducted by the Oklahoma Commission to explore whether SBC has complied with Section 271 was so fundamentally flawed that the constitutional rights of the parties to substantive and procedural due process were violated. After spending months developing through hearings an Oklahoma-specific performance measurement plan, the Oklahoma Commission adopted one and immediately abandoned it. In a complete about-face that deprived the parties of a meaningful opportunity to present their cases, the Oklahoma Commission decided instead to analyze a new performance measurement plan imported from Texas. The Oklahoma Commission then completely abdicated its regulatory responsibilities by accepting the Texas plan without independent, third-party testing to learn whether SBC’s ordering and provisioning systems in Oklahoma could be operated properly by its employees in that state.

After it had rendered its Section 271 order, the Oklahoma Commission again violated the procedural rights of the parties. Without notice or an opportunity to be

heard, the Oklahoma Commission ordered important changes to that decision after the fact. The Commission attempted to masquerade these changes as only the correction of clerical mistakes; however, they actually cause major alterations to the rights and obligations of the parties. Competitors are forced by these changes to interconnect with SBC facilities at points that may be inefficient to them and lack engineering soundness. They also are forced to permit SBC to use their collocation space without compensation to deliver traffic from SBC customers bound for customers of the competitors.

Cox also is concerned about other improprieties in the Oklahoma Commission Section 271 process. For example, as a result of private *ex parte* contacts between the Oklahoma Commission's staff members, the aides to its Commissioners and representatives of SBC, the staff and SBC entered into a two-party agreement that profoundly impacted the proceeding in ways that were injurious to the other parties' rights. Similarly, the changing role played by the Oklahoma Commission's staff in the proceeding made it impossible for the other parties to determine how to deal with the staff. Over the course of the proceeding, the staff switched from "neutral advisor" to "advocate" back to "neutral advisor" again. Such gyrations created considerable confusion among the parties with respect to how to proceed with their cases.

If the Oklahoma Commission submits a written consultation concluding that SBC has complied with Section 271, Cox urges the FCC to reject such a finding. The fatal defects in the proceeding that was conducted at the state level destroy any credibility that this written consultation might otherwise enjoy. As the product of a flawed process, this written consultation should be assigned no weight by the FCC.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	2
II. BACKGROUND	3
III. FULL COMPETITION HAS NOT DEVELOPED IN OKLAHOMA'S LOCAL TELEPHONE SERVICE MARKET	4
IV. SBC DOES NOT PROVIDE ACCESS AND INTERCONNECTION TO TELECOMMUNICATIONS CARRIERS IN A MANNER THAT COMPLIES WITH THE REQUIREMENTS OF SECTION 271	5
V. THE PROCEEDING CONDUCTED BY THE OKLAHOMA COMMISSION IS FATALLY FLAWED BY VIOLATIONS OF THE PARTIES' RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS	9
A. THE <i>NUNC PRO TUNC</i> ORDER	9
B. THE DISAPPEARING PERFORMANCE PROCEEDING	11
C. <i>EX PARTE</i> CONTACTS	12
D. ROLE OF THE COMMISSION'S STAFF	14
VI. ANY WRITTEN CONSULTATION SUBMITTED BY THE OKLAHOMA COMMISSION SHOULD BE REJECTED IN VIEW OF THE FATAL DEFECTS IN THE STATE PROCEEDING	15
VII. CONCLUSION	16

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Application of SBC Communications, Inc.	)	
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996	)	CC Docket No. 00-217
To Provide In-Region, InterLATA Services	)	
in Kansas and Oklahoma	)	

**COMMENTS IN OPPOSITION  
BY COX COMMUNICATIONS, INC.**

In accordance with the Public Notice, DA 00-2414, released October 26, 2000, Cox Communications, Inc. ("Cox") submits these Comments in Opposition ("Comments in Opposition") to the application filed in the above-referenced proceeding. On October 26, 2000, SBC Communications, Inc. and its subsidiaries (collectively, "SBC") filed an application ("Application") for authority to furnish in-region, interLATA services in Kansas and Oklahoma. The Application was filed pursuant to Section 271 of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("the Act"). Cox opposes the FCC's grant of the Application because SBC has not met the requirements of Section 271 (c)(2)(B) of the Act ("the Competitive Checklist"). Additionally, the proceeding ("Oklahoma 271 Proceeding")<sup>1</sup> conducted by the Corporation Commission of the State of Oklahoma ("Oklahoma Commission") to explore whether SBC has complied with Section 271 in that state was so fundamentally flawed that the constitutional rights of the parties to substantive and procedural due process were violated. Accordingly, Cox urges

---

<sup>1</sup> Cause No. PUD 970000560.

the FCC to reject any written consultation submitted by the Oklahoma Commission, purportedly based on its findings in the Oklahoma 271 Proceeding, concluding that SBC has complied with Section 271 in that state.

## **I. INTRODUCTION.**

A Cox subsidiary, Cox Oklahoma Telcom, L.L.C., is Oklahoma's only true facilities-based local telecommunications service provider. Cox has invested significant sums to upgrade its cable networks in the state to provide advanced two-way services to its customers. As part of this effort, Cox has begun providing local telecommunications services to both residential and business customers in Oklahoma. As it deploys these services more broadly, Cox will be positioned to offer robust competition to SBC's affiliate, Southwestern Bell Telephone Company ("SWBT").

When the Act's objective of opening the Oklahoma market for local telecommunications service to competition is realized, Oklahoma citizens will enjoy a choice in the selection of a local telephone service provider. Cox will continue to compete vigorously in this market, providing telecommunications services of the highest quality on par with the service its cable subsidiary's customers have come to expect. Because Cox's objective is to compete in the local market, it has no desire to prevent SBC from entering the already highly-competitive long distance telephone market in Oklahoma at the proper time. Rather, Cox is submitting these comments to inform the FCC that the time is not yet ripe because the local telephone market in Oklahoma remains dominated by SWBT as a virtual monopoly and is not yet fully open to competition.

## II. BACKGROUND.

The Application represents SBC's second attempt to win Section 271 authority for Oklahoma. The first effort failed when the FCC rejected SBC's initial application<sup>2</sup> filed in April of 1997. The FCC denied the application, finding that SBC did not face sufficient competition in Oklahoma and failed to meet the Competitive Checklist.

The Oklahoma Commission later re-opened the Oklahoma 271 Proceeding to explore whether SBC's efforts subsequent to 1997 were sufficient to comply with the requirements of Section 271. In a Report issued on January 28, 1999, the Oklahoma administrative law judge ("ALJ") found that SBC had failed to satisfy six requirements of the Competitive Checklist. One of those shortcomings was a failure to implement a performance measurement plan, which will be discussed in more detail below. The ALJ's decision was adopted in August of 1999 as a factual finding by the Oklahoma Commission.<sup>3</sup>

In June of this year, SBC moved to again re-open the Oklahoma 271 Proceeding, and submitted to the Oklahoma Commission a revised application intended for FCC filing and a revised Oklahoma 271 agreement (the "O2A"). This action started the final phase of the Oklahoma 271 Proceeding, which addressed these pleadings. In September, the Oklahoma Commission entered an order<sup>4</sup> holding: (1) that SBC had satisfied the requirements of Section 271, subject to its modifying the O2A as directed; and (2) that SBC's entry into the long distance market in Oklahoma would be in the public interest.

---

<sup>2</sup> Memorandum Opinion and Order, 12 FCC Rcd 8685 (1997).

<sup>3</sup> Order No. 434494, filed August 18, 1999.

<sup>4</sup> Order No. 445180, filed September 28, 2000 ("Oklahoma 271 Order").

### **III. LOCAL EXCHANGE COMPETITION HAS JUST BEGUN IN OKLAHOMA .**

In support of SBC's claim that the local telephone market in Oklahoma is now fully open to competition, the Application relies upon various estimates that have no basis in fact. First, the number of competitive local exchange carriers ("CLECs") claimed by SBC to now be operating in Oklahoma is wholly unsupportable. Based on the knowledge it has gained through operating as a CLEC in Oklahoma for nearly three years, Cox believes that SBC's allegation that "at least 27 CLECs are currently providing facilities-based local service"<sup>5</sup> is far too generous. Its own experience suggests that, even under the broadest definition of a "facilities-based" competitor, the actual number of facilities-based CLECs offering local telecommunications service to businesses is roughly half that number. Moreover, Cox believes that it is the only CLEC now operating in Oklahoma that relies predominantly on its own facilities to provide either business or residential service. And, significantly, it is the only facilities-based CLEC that provides residential local exchange service.

Moreover, SBC's estimate that CLECs serve somewhere between 115,000 and 170,000 total access lines in Oklahoma is a complete guess. The breadth of the estimated range furnishes conclusive evidence that this supposition belongs in the category of a "back-of-an-envelope" reckoning. SBC also has not supported its claim that CLECs serve 49,000 residential customers in the Oklahoma territory served by SWBT, nor does it estimate how many of those customers are simply being served by resellers. Indeed, given that Cox, the state's only facilities-based competitor to offer consumer services,

---

<sup>5</sup> Application, Executive Summary, p. iii.



Commenter: Cox

Applicant: SBC

State: OK

entered the residential market just one year ago, there is every reason to believe that the vast majority of the alleged 49,000 residential customers cited by SBC are in fact purchasing resold SBC services.

The Oklahoma 271 Order concluded that, in addition to Cox, two facilities-based CLECs operating in Oklahoma, Brooks Fiber and Logix, were presently providing local exchange service to residential customers. In response to that conclusion, Cox's Manager of Regulatory Affairs for Oklahoma, Katy Parrish, submitted an affidavit in the Oklahoma 271 Proceeding. In her affidavit, Ms. Parrish stated that she contacted both CLECs on several occasions and was told by their representatives repeatedly and unequivocally that neither offers telephone service to residential customers in Oklahoma. A copy of Ms. Parrish's affidavit is attached as Exhibit A.

No action was taken by the Oklahoma Commission to rectify this serious mistake in fact. As a result, Cox believes that the Oklahoma 271 Order contains factual errors which are relied upon by the Oklahoma Commission to support the false conclusion that Oklahoma's local telephone market for residential service is competitive. Cox urges the FCC to adopt the correct conclusion -- namely, that facilities-based competition for residential Oklahoma customers has only just begun.

#### **IV. SBC DOES NOT PROVIDE ACCESS AND INTERCONNECTION TO TELECOMMUNICATIONS CARRIERS IN A MANNER THAT COMPLIES WITH THE REQUIREMENTS OF SECTION 271.**

The Oklahoma Commission committed fundamental error in the Oklahoma 271 Proceeding by relying on the findings of the Texas Commission with regard to SBC's operations in that state, rather than conducting an independent investigation of SBC's operations in Oklahoma. A major violation of the parties' right to a fair and impartial

hearing occurred when the Oklahoma Commission accepted the Texas Commission's findings in a wholesale fashion,<sup>6</sup> ruling that if SBC's case was good enough for Texas, then it is good enough for Oklahoma. Cox points out that, since it does not yet offer telephone services in Texas, it has not been a party to any regulatory proceedings conducted by the Texas Commission and accordingly did not participate in the proceedings in which these findings were issued.

In an unprecedented delegation of its regulatory authority to an agency of a neighboring state, the Oklahoma Commission conditioned its approval on SBC's modifying the O2A to reflect any changes to the performance measurement plan that may later be ordered by the Texas Commission. This preference for another state's plan becomes even more suspect in light of the investment by the Oklahoma Commission and the parties in a proceeding designed to adopt an Oklahoma-specific performance measurement plan (the "Performance Proceeding").<sup>7</sup> As mentioned above, the failure to implement such a plan was one of the items on the Competitive Checklist that the ALJ found in the January 28, 1999 Report and Order that SBC did not satisfy. To rectify this situation, the Oklahoma Commission opened the Performance Proceeding in March of this year.

The Performance Proceeding was to address a range of performance issues, including the establishment of Oklahoma-specific measures, a review process for compliance, and appropriate penalties for noncompliance. In an effort to simplify the docket, it was agreed by the parties that the proceeding would be divided into two phases. The first phase was designed to establish the Oklahoma-specific measures. The second

---

<sup>6</sup> Oklahoma 271 Order, p. 153.

phase was designed to address the remaining issues, which also included performance remedies, necessary validation of performance measurements and data, statistical analysis and a minimum period of compliance.

During May of this year, a hearing was conducted by an ALJ in the first phase of the Performance Proceeding. As a result of that hearing, the ALJ ordered<sup>8</sup> the adoption of Oklahoma-specific performance measures. These measures included 11 entirely new performance measures and 82 measures from the Texas plan, modified to suit Oklahoma. Yet despite the parties' understanding that the second phase of the Performance Proceeding would be completed before the Oklahoma 271 proceeding was re-opened, the Oklahoma Commission initiated the final phase of the 271 Proceeding during the next month. In response, SBC filed a motion to consolidate both the Performance and the 271 Proceedings. If it had been granted, the motion would have ensured that the performance issues were considered as part of the evaluation of SBC's Section 271 application. However, SBC subsequently withdrew its motion pursuant to an agreement<sup>9</sup> that it reached with the staff of the Oklahoma Commission. A copy of that agreement is attached as Exhibit B.

At this juncture, the Performance Proceeding disappeared and the Oklahoma Commission opted instead to rely entirely on the performance measures adopted in Texas. The Commission did not explain why it elected to abandon the investment of resources by the agency and the parties to its own performance docket. Nor has any satisfactory explanation ever been given as to why the Oklahoma Commission preferred

---

<sup>7</sup> Cause No. PUD 990000131.

<sup>8</sup> Report and Recommendation issued on June 20, 2000.

<sup>9</sup> "Agreed Points," filed of record in Cause No. PUD 990000131.

to accept a plan approved by the Texas Commission over an Oklahoma-specific plan which was the result of a lengthy evidentiary hearing. This is only one of several inexplicable moves made by the Oklahoma Commission as it rushed to judgment in the Oklahoma 271 Proceeding.

The success of performance measurement plans is critical to the achievement of the Act's overarching goal of creating competitive local exchange markets in which new entrants are assured a fair opportunity to compete, unhampered by the dominance of the incumbents. If competitive markets are to flourish, new entrants must rely upon interconnection with the incumbent's facilities as well as upon services, either for purposes of resale or for access to unbundled network elements, furnished by incumbents. These same incumbents will continue to wield the power that flows from market dominance for the foreseeable future. With such power comes the opportunity to act in an anticompetitive manner. A performance measurement plan can effectively serve as a brake on such anticompetitive behavior. However, the Oklahoma Commission did not see fit to make an independent assessment of whether the performance measurement plan approved by the Texas Commission offered adequate incentives to ensure that SBC performed satisfactorily in Oklahoma.

In an even more shocking abdication of its regulatory responsibilities, the Oklahoma Commission accepted the Texas performance measurement plan without independent, third-party testing of SBC's ordering and provisioning systems in Oklahoma. Such testing is necessary to gather "real world" evidence of whether these systems do, in fact, work. Assuming that they will work in Oklahoma because they seem to work in Texas exalts theory over practice. This acceptance by the Oklahoma

Commission of mere promises to open the local market to competition without factual evidence generated in Oklahoma is woefully inadequate to support the finding in the Oklahoma 271 Proceeding that the local market is fully competitive at present. Cox submits that the conclusions of the Texas Commission cannot so easily be transported across state boundaries into Oklahoma. New entrants in Oklahoma will place orders with SBC personnel for provisioning of services and facilities in that state, and the relevant question is how well SBC's Oklahoma systems and employees perform. This issue can not be adequately assessed in the absence of independent, third-party testing in Oklahoma.

**V. THE PROCEEDING CONDUCTED BY THE OKLAHOMA COMMISSION IS FATALLY FLAWED BY VIOLATIONS OF THE PARTIES' RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS.**

**A. THE *NUNC PRO TUNC* ORDER.**

On October 4, 2000, the Oklahoma Commission entered Order No. 445180 ("*Nunc Pro Tunc* Order") in the Oklahoma 271 Proceeding.<sup>10</sup> The *Nunc Pro Tunc* Order<sup>11</sup> amends the Oklahoma 271 Order by substituting revised language for the original language found in separate paragraphs on pages 164 and 182 of the Oklahoma 271 Order. While such an order is authorized under Oklahoma law for the purpose of correcting clerical mistakes, errors or omissions, the revised language makes material and substantive changes to the Oklahoma 271 Order in violation of state law.

These amendments have a significant impact on all CLECs, including Cox. The most significant change deleted an attachment to the O2A that had been proposed by a

---

<sup>10</sup> This appears to be a *sua sponte* decision by the Oklahoma Commission to alter the Oklahoma 271 Order without a request from any party to do so.

<sup>11</sup> The *Nunc Pro Tunc* Order is titled: "Order *Nunc Pro Tunc* Regarding Order No. 445180."

CLEC, and substituted an attachment proposed by SBC. The effect of this substitution is to force CLECs to interconnect with SBC's facilities at points that may be inefficient to the CLEC. The deleted language would have permitted CLECs to negotiate such interconnection points with SBC based on sound engineering practices and economic efficiency, and would have protected the parties' interests where agreement could not be reached.

Another change of crucial importance permits SBC to dictate that collocation space in SBC's end offices -- for which CLECs must pay SBC dearly -- may be used to deliver interconnected traffic originated by SBC and bound for the CLECs' customers. To add insult to injury, this change allows SBC to use CLEC transport facilities that connect facilities in the collocation space to the CLECs' network for this purpose without compensation. The change grants SBC this right notwithstanding the alleged scarcity of such space and the CLECs' intention to use it for other purposes. The change thus results in a blatant shift of cost and engineering burden from SBC to the CLECs.

The final impact of the change on CLECs is that it forces new entrants to build duplicative and wasteful facilities and to pay SBC common transport charges associated with traffic originated by CLECs and bound for SBC customers. As a result, only SBC's costs are reduced by the change. The original language adopted by the Oklahoma Commission provided that each party is responsible for building or leasing facilities to the other party's interconnection point, a rational configuration that caused each party to bear the cost up to that point.

These revisions constitute substantive, material changes to the Oklahoma 271 Order that cannot be made through the adoption of a purely ministerial device, such as an

order *nunc pro tunc*. Material changes require notice to interested parties and an opportunity for them to be heard on the issues addressed. The unilateral adoption of the *Nunc Pro Tunc* Order, without notice and hearing, violated the fundamental concept of due process. It should have been retracted, as requested by the parties whose rights were ignored, but the Oklahoma Commission failed to correct that violation.

## **B. THE DISAPPEARING PERFORMANCE PROCEEDING.**

Unfortunately, the *Nunc Pro Tunc* Order was only one in a series of errors that deprived the parties to the case below of a full hearing. As indicated above, the Oklahoma Commission's failure to consider the issue of Oklahoma-specific performance measures in the Section 271 Proceeding was a denial of due process. As a result of procedural maneuvering by SBC, the issues addressed in the Performance Proceeding were never formally consolidated into the Oklahoma 271 Proceeding. Indeed, despite the fact that the parties constantly inquired about the status of the performance issues, they were never given an adequate opportunity to present their case. When asked on one of several occasions by the parties involved, on July 20, 2000, the ALJ stated on the record that performance issues were not part of the Oklahoma 271 Proceeding. In reliance on this statement, the parties to that proceeding moved forward to address other issues. Then, at the eleventh hour, the ALJ reversed himself at a hearing on August 24<sup>th</sup> by stating that the performance measurement issues were an outgrowth of the Oklahoma 271 Proceeding and that he would take judicial notice of the Performance Proceeding. This ruling was made after all of the parties had filed their testimony in reliance on his earlier decision. To make matters worse, it was also announced less than a month before the hearings in the Oklahoma 271 Proceeding commenced on September 18<sup>th</sup>. This change

of judicial mind, coming as it did only days prior to the hearing, was an infringement of the parties' right to notice of the issues to be heard and to a fair opportunity to present evidence in support of their positions on those issues.

In short, the parties never received sufficient notice that the Oklahoma Commission intended to abandon the Oklahoma-specific performance measure plan that was considered and adopted in the Performance Proceeding. Nor did they receive notice that the Commission would consider all performance issues anew, with an eye to the Texas experience, in the Oklahoma 271 Proceeding. The parties thus lost important procedural opportunities to present their cases and fully address Oklahoma-specific performance issues before the Oklahoma Commission.

### **C. *EX PARTE* CONTACTS.**

Additional due process concerns were raised in connection with *ex parte* communications that took place during the Oklahoma 271 Proceeding and without the participation of all parties to the case. Meetings -- which might be characterized as "settlement discussions" if all parties had taken part -- took place between certain employees of the Oklahoma Commission and SWBT representatives that constitute inappropriate *ex parte* contact. While the attendance of commission staff members ("Staff") may have been supportable if all parties had an opportunity to join in the discussions, serious implications arise from the attendance of the Oklahoma Commissioners' aides ("Aides"). The Aides' participation in a legislative matter may be appropriate in certain circumstances; however, the Oklahoma 271 Proceeding is a judicial matter. Indeed, all parties to the case were aware that it was a judicial hearing because



the Commission itself had so ruled.<sup>12</sup> Further, there is no question that the Staff and the Aides knew the status of the case as being adjudicatory in nature.

In spite of these concerns (which were expressed by several parties), the Staff, Aides and SWBT representatives met privately and an agreement<sup>13</sup> was reached between them with respect to both procedural and substantive issues. The agreement was then presented to the Oklahoma Commission, to the other parties' surprise, on the morning of the hearing during which the Commission permitted the SBC Section 271 application to go forward. The agreement was subsequently filed in the Oklahoma 271 Proceeding.

The impact of this private meeting and its resulting agreement can be seen in subsequent acts. Although Staff had vigorously opposed certain motions filed by SWBT in June, they abruptly changed that position only five days after the meeting. This change in positions by one of the parties to the case is suspicious in light of the attendance of the Aides at the meeting; at best, their attendance creates the appearance of impropriety that flows from possible influence by the Commissioners through their aides.

Finally, if the Aides did not attend in their official capacity as advisors to their respective Commissioners, there was no reason for their attendance. They were not parties to the case. Therefore, their only capacity at the meeting can be as representatives for the Commissioners. The meeting was a private one between the Section 271 applicant and the decisionmaking staff. The other parties to the hearing were not invited and only learned about it after the fact. The meeting resulted in a complete change of position by Staff on issues, both substantive and procedural, that were the subject of a

---

<sup>12</sup> Order No. 422736.

<sup>13</sup> See Note 9.

pending adjudicatory proceeding. There was strong disagreement among the parties about the proper resolution of these issues. Clearly, resolution of these issues in favor of SWBT gave SWBT a “procedural or tactical advantage” in this case. Consequently, such discussions, to the extent they included the Aides acting in their capacity as representatives of the Oklahoma Commissioners, would constitute inappropriate *ex parte* contact.

#### **D. ROLE OF THE COMMISSION’S STAFF**

The changing role of Staff in the Oklahoma 271 Proceeding also hindered the parties in determining the weight to give to Staff’s efforts. From the outset of this proceeding, questions arose about Staff’s intended role along with whether it was to be conducted as an adjudicatory proceeding.

Staff took an early position that it intended to serve in an advisory capacity only to ensure that the record created in the case was full and complete and that it did not intend to advocate positions. Staff’s neutral advisor role was confirmed by Order No. 422736.

However, Staff abandoned this position when SBC moved to reopen the Oklahoma 271 Proceeding that had remained dormant following the FCC’s rejection of its original application for Section 271 authority in 1997. Rather than remaining neutral, Staff objected to this motion, as well as to SBC’s request for consolidation of the issues from the Performance Proceeding into the Oklahoma 271 Proceeding.

Then at the eleventh hour, Staff reversed its previous position opposing SBC’s motions by announcing that it had entered the two-party agreement with SBC and would now support SBC’s motions. Staff’s role in advocating a position and entering into a

secret agreement with SBC violated Order No. 422736. Staff reversed its position for a final time when Order No. 422736 was brought to its attention.

Order No. 422736 dictates that Staff was to act in a neutral advisor capacity in this case. Staff's abandonment of that ordered role, in advocating positions and by making a "back-room" deal with SBC, raises serious *ex parte* concerns and irreparably violates the substantive rights of the other parties.

**VI. ANY WRITTEN CONSULTATION SUBMITTED BY THE OKLAHOMA COMMISSION SHOULD BE REJECTED IN VIEW OF THE FATAL DEFECTS IN THE STATE PROCEEDING.**

Because of the fatal defects in the state proceeding described above, Cox urges the FCC to reject any written consultation submitted by the Oklahoma Commission that is based on findings generated through the flawed adjudicatory proceeding conducted at the state level. The Oklahoma 271 Proceeding was profoundly unfair and consistently violated the legal rights of the parties to substantive and procedural due process of law. The manner in which this case was conducted cannot be said to result in a fair and impartial decision by the Oklahoma Commission based on the factual evidence presented at the hearing and the legal arguments made by the parties to the proceeding.

There are additional substantive reasons for the FCC to reject the Oklahoma Commission's written consultation in this case. Many of the "conditions" imposed on SBC by the Oklahoma 271 Order are actually mere suggestions. As an example, the Oklahoma Commission found<sup>14</sup> that an improvement to the O2A could be developed if the parties were given additional time to debate revisions to it. The Oklahoma

---

<sup>14</sup> Oklahoma 271 Order, page 152.

Commission thus directed the parties to discuss appropriate revisions to the O2A, and if they cannot reach agreement, to submit supplemental reports to the Commission and the FCC. Such direction is nothing more than a suggestion, however, because the Oklahoma Commission has not established any procedure for addressing disputed issues that remain. Nevertheless, the Oklahoma Commission “approved” the O2A.

The *Nunc Pro Tunc* Order raises yet another deeply troubling matter.

“Conditions” in the Oklahoma 271 Order were essentially retracted by the *Nunc Pro Tunc* Order, demonstrating that, in its hurry to recommend that the FCC approve the Application, the Oklahoma Commission adopted inappropriate “conditions” that later required retraction and substitution of appropriate “conditions.”

Finally, the need felt by the Oklahoma Commission to attach “conditions” necessarily leads to the conclusion that the FCC’s approval of the Application is premature. In its rush to acquiesce to SBC’s demands for a grant of approval by the end of September, the Oklahoma Commission proceeded despite its acknowledgement that more attention needs to be paid to SBC’s practices and procedures in Oklahoma. As an example, the Oklahoma Commission has not set permanent prices for many of the services and facilities, such as loop conditioning and collocation, that competitors must obtain in order to conduct their business in Oklahoma.

## **VII. CONCLUSION.**

The Oklahoma Commission’s proceedings concerning SBC’s efforts to gain Section 271 approval have been conducted in such a manner that the parties were denied a fair and impartial hearing. Based on these fatal defects, Cox urges the FCC to disregard the written consultation of the Oklahoma Commission in this matter. Without regard

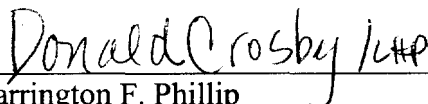
Commenter: Cox

Applicant: SBC

State: OK

solely to these procedural errors, Cox also has shown that SBC has not yet satisfied all of the Competitive Checklist requirements that must be met in order to qualify for Section 271 authority. Accordingly, for the reasons stated herein, Cox requests the FCC to deny the Application and to declare that SBC has not satisfied the obligations of Section 271 of the Act.

Respectfully submitted,

  
Carrington F. Phillip  
Vice President-Regulatory Affairs  
and  
Donald L. Crosby  
Senior Counsel

Cox Communications, Inc.  
1400 Lake Hearn Drive, NE  
Atlanta, GA 30319  
(404) 843-5791

November 15, 2000

## **EXHIBIT A**

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

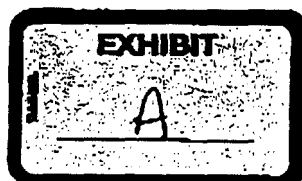
APPLICATION OF THE ATTORNEY )  
GENERAL OF THE STATE OF )  
OKLAHOMA, AT&T COMMUNICATIONS )  
OF THE SOUTHWEST, INC., BROOKS )  
FIBER COMMUNICATIONS OF TULSA, )  
INC., COX OKLAHOMA TELCOM, INC., )  
MCI TELECOMMUNICATIONS )  
CORPORATION, AND SPRINT )  
COMMUNICATIONS, L.P. TO EXPLORE )  
SOUTHWESTERN BELL TELEPHONE )  
COMPANY'S COMPLIANCE WITH )  
SECTION 271(C) OF THE )  
TELECOMMUNICATIONS ACT OF 1996 )

CAUSE NO. PUD 970000560

**AFFIDAVIT**

I, Katy Evans Parrish, a representative of Cox Oklahoma Telcom, L.L.C. ("Cox"), state that I have personal knowledge and information of the facts herein contained and being first duly sworn, allege and state:

1. I am the Manager of Regulatory Affairs for Cox.
2. I am aware of the status of facilities based competition in the local telephone market in the State of Oklahoma and the competitors of Cox Oklahoma Telcom, L.L.C.
3. After review of the findings in Commission Order No. 445180 regarding facilities based competition in Oklahoma, I contacted Logix and Brooks to inquire as to whether either of these companies currently offers telephone service to residential customers in the State of Oklahoma.
4. The inquiries I made to Logix and Brooks occurred on October 3 and October 5, 2000. I spoke with more than one representative from each company. Each company



representative I spoke with unequivocally confirmed that neither Brooks nor Logix offered telephone service to residential customers in the State of Oklahoma.

FURTHER AFFIANT SAYETH NOT.

BY:

Katy Parrish  
Katy Evans Parrish

Subscribed and sworn to before me, a Notary Public, this 9<sup>th</sup> day of October, 2000.

My Commission Expires:

10-9-2002

Belinda Elliott  
Notary Public





## **EXHIBIT B**

JUL 18 2000

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF THE ATTORNEY GENERAL  
OF THE STATE OF OKLAHOMA, AT&T  
COMMUNICATIONS OF THE SOUTHWEST,  
INC., BROOKS FIBER COMMUNICATIONS OF  
TULSA, INC., COX OKLAHOMA TELCOM, INC.,  
MCI TELECOMMUNICATIONS CORPORATION,) AND SPRINT COMMUNICATIONS, L.P. TO  
EXPLORE SOUTHWESTERN BELL TELEPHONE  
COMPANY'S COMPLIANCE WITH SECTION 271(c)  
OF THE TELECOMMUNICATIONS ACT OF 1996.)

CAUSE NO. PUD 970000560

**FILED**

JUL 17 2000

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

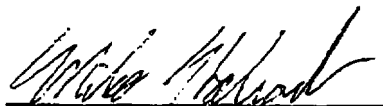
NOTICE OF AGREEMENTS BETWEEN ERNEST G. JOHNSON, DIRECTOR OF THE  
PUBLIC UTILITY DIVISION, OKLAHOMA CORPORATION COMMISSION AND  
SOUTHWESTERN BELL TELEPHONE COMPANY

COME NOW, Ernest G. Johnson, Director of the Public Utility Division, Oklahoma Corporation Commission ("PUD"), and Southwestern Bell Telephone Company ("SWBT"), pursuant to Procedural Order No. 442415 issued on June 30, 2000, and respectfully submit the "Agreed Points", attached hereto as Attachment "A", which reflect all agreements reached to date between the PUD and SWBT in this cause. The PUD and SWBT note that the attached agreements were previously submitted to the Commission and parties at the Oral Appeals argued to the Commission on June 21, 2000.

Respectfully submitted,

ERNEST G. JOHNSON, DIRECTOR  
PUBLIC UTILITY DIVISION

SOUTHWESTERN BELL TELEPHONE  
COMPANY



Maribeth D. Snapp, OBA #6721  
Deputy General Counsel  
Miles Halcomb, OBA #12957  
Assistant General Counsel  
OKLAHOMA CORPORATION  
COMMISSION  
Post Office Box 52000-2000  
Oklahoma City, Oklahoma 73152-2000  
Telephone: 405/521-1072



Mary W. Marks, OBA #5693  
Travis M. Dodd, OBA #16827  
Robert J. Gryzmala  
800 North Harvey, Room 310  
Oklahoma City, Oklahoma 73102  
Telephone: 405/291-6756

Curtis M. Long, OBA #5504  
Gardere & Wynne, L.L.P.  
100 West Fifth Street, Suite 200  
Tulsa, Oklahoma 74103-4240  
Telephone: 918/699-2959

**AGREED POINTS  
SWBT AND OCC STAFF  
CAUSE NOS. 99-131 AND 97-560**

- SWBT withdraws its Motion to Consolidate Causes 99-131 and 97-560, in both dockets.
- Staff withdraws its Motion for Order for Supplemental Procedural Schedule in Cause No. 99-131.
- Staff will not oppose SWBT's Motion to Reopen Cause No. 97-560 and agrees to join SWBT in proposing a procedural schedule (to be filed no later than 6/23/00) that will be completed in time for the OCC to issue an Order concerning its support of SWBT's Section 271 application at the FCC, by no later than September 30, 2000.
- The Administrative Law Judge (ALJ) issued his written Report and Recommendations in Cause No. 99-131 on 6/20/00. The written Report and Recommendations includes a provision that any party may request that the findings and conclusions on SWBT's performance measures be reassessed and revised in conjunction with the outcome of the Texas 6-month review of performance measures, which is expected to be adopted by the Texas Public Utility Commission on 7/12/00.
- Issuance of the Report and Recommendations in Cause No. 99-131 commences the 10-day appeals window, which will conclude on 6/30/00.
- SWBT will not appeal the Report and Recommendations of the ALJ, and Staff and SWBT will jointly request the OCC to adopt, by July 10, 2000, an Interim Order stating the following:
  - The ALJ's Report and Recommendations are adopted on condition that the performance measures contained therein will be reassessed in light of the outcome of the Texas 6-month review and in recognition that there may be practical considerations related to the implementation of some of the performance measures recommended in 99-131;
  - Because of the anticipated reassessment described above, the ALJ's Report and Recommendations contain performance measures which may never be implemented;
  - SWBT's Oklahoma performance data produced in accordance with performance measures in Texas Version 1.6, as reported in Oklahoma, will be the performance data used to evaluate SWBT's Section 271 application in Cause No. 97-560; and
  - Any other unresolved performance measures issues, including, but not limited to validation and the Oklahoma performance penalty plan, will be presented/considered in Cause No. 97-560, in conjunction with examination of the Oklahoma 271 Agreement (O2A).
- Following the Interim Order, and sufficiently in advance of August 23, 2000, SWBT, Staff, and any other parties to Cause No. 99-131 will review the Texas 7/12/00 order and factor in changes in the interim Order as proof supports and develop a procedural schedule that will provide for a revised Interim Order out by 8/23/00.

Commenter: Cox  
Applicant: SBC  
State: OK

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **COMMENTS IN OPPOSITION BY COX COMMUNICATIONS, INC.** was sent by hand delivery this 15th day of November 2000, or via U.S. mail where indicated, to the following:

Janice M. Myles  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Room 5-C327  
Washington, D.C. 20554

John Stanley  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, SW  
Room 5-C124  
Washington, D.C. 20554

International Transcription Services, Inc.  
445 - 12th St., SW  
Room CY-B402  
Washington, D.C. 20554

\*Alfred G. Richter, Jr.  
Southwestern Bell Telephone  
Company  
175 E. Houston, Room #1250  
San Antonio, TX 78205

\*James D. Ellis  
Paul K. Mancini  
Martin E. Grambow  
Kelly M. Murray  
Robert J. Gryzmala  
John Di Bene  
SBC Communications Inc.  
175 E. Houston  
San Antonio, TX 78204

\*Michael K. Kellogg  
Geoffrey M. Klineberg  
Kellogg, Huber, Hansen, Todd  
& Evans, P.L.L.C.  
Sumner Square  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
*Counsel for SBC Communications Inc.,  
Southwestern Bell Telephone Company, and  
Southwestern Bell Communications Services,  
Inc.*

\*April J. Rodewald  
Southwestern Bell Telephone Company  
220 E. Sixth Street  
Room 515  
Topeka, Kansas 66606

\*Mary W. Marks  
Southwestern Bell Telephone Company  
800 North Harvey, Room 310  
Oklahoma City, Oklahoma 73102

